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In the Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSONS, INC., PETITIONER,

v.

HALLIE KIRKINGBURG, RESPONDENT.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth CircuitBRIEF AMICUS CURIAE FOR THE AMERICAN
TRUCKING ASSOCIATIONS, ET AL.,
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The *amici curiae* will address the following question:

Whether an impairment which merely affects, but does not significantly restrict, a major life activity, and which is ameliorated by internal compensating mechanisms or external mitigating measures, falls within the Americans with Disabilities Act's definition of disability as a physical or mental impairment that "substantially limits" a major life activity.

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**BRIEF AMICUS CURIAE OF THE AMERICAN
TRUCKING ASSOCIATIONS, ET AL., IN SUPPORT
OF PETITIONER**

INTEREST OF THE *AMICI CURIAE*¹

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

The American Moving & Storage Association ("AMSA") is the national trade association of the moving and storage industry. It has approximately 3,500 members worldwide and represents the entire spectrum of the United States domestic moving and storage industry. AMSA's membership includes 25 national van lines, 1,100 independent regulated carriers, 1,600 agents of van lines (1,000 of whom are also regulated carriers), and over 500 international movers.

The Towing & Recovery Association of America ("TRAA") is a national association of more than 1,400 towing and recovery operators serving North America. TRAA is charged with promoting professionalism, quality

¹ The written consents of the parties to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

customer service, and safety in towing operations throughout the country.

The Specialized Carriers & Rigging Association ("SC&RA") is a national association of motor carriers that transport commodities whose unusual size or weight requires special transportation equipment. SC&RA's over 1,000 members include steel haulers, oil field equipment transporters, crane and rigging companies, millwright contractors, and transporters of construction and military equipment.

The Truckload Carriers Association ("TCA") is a national trade association representing the motor carrier industry's irregular-route truckload segment (such as dry van, refrigerated, flatbed, and dump trailers). TCA's more than 600 motor carrier members are domiciled throughout the continental United States, and serve the United States, Mexico, and Canada.

The National Tank Truck Carriers, Inc. ("NTTC") is a national trade association of 200 corporate members specializing in transporting hazardous materials, substances, and wastes in cargo tank trucks. Its members operate throughout the United States, Mexico, and Canada.

The Association of Waste Hazardous Materials Transporters ("AWHMT") is a national association of motor carriers that transport hazardous waste materials, such as industrial and radioactive wastes. Through its approximately 80 members, the AWHMT promotes professionalism and performance standards that minimize risks to the environment, public health, and safety.

The National Automobile Transporters Association ("NATA") represents motor carriers that transport over 95% of all new motor vehicles through either driveaway or truckaway operations. NATA represents the joint interest of

its nineteen carrier members, and seeks continuously to improve their quality of service, safety, and productivity.

The issues at stake in this case are of direct concern to *amici* and their members. *Amici* strongly support, and are deeply committed to, equality of employment opportunity for all persons and believe that discrimination in all forms should be eliminated from the workplace. At the same time, *amici*'s members, as employers of millions of workers, have a large stake in ensuring that the provisions of the Americans with Disabilities Act are fairly applied.

The Ninth Circuit's definition of disability allows individuals whose medical conditions merely make them "different" to qualify as "disabled" persons entitled to the ADA's full panoply of protections. This overly-broad interpretation ignores the statutory requirement that an impairment "substantially limit" one or more of a person's major life activities. At odds with congressional intent, the Ninth Circuit's position would make a huge segment of the American population into "disabled" persons covered by the Act, imposing unwarranted costs on employers and undermining the ADA's goal to eliminate discrimination against the truly disabled. *Amici* have strong interests in establishing a fair and workable standard of disability that, by taking into account internal and external mitigating factors, encompasses only those persons who are truly limited in a major life activity.

STATEMENT

Respondent Hallie Kirkingburg has very poor vision in his left eye, which is caused by amblyopia ("lazy eye"). This condition is not correctable with lenses. However, because Kirkingburg has had the condition since birth, his brain has developed subconscious mechanisms to compensate for his visual deficiencies. Pet. App. 10a, 14a. These mechanisms

have been so effective that over the years Kirkingburg has successfully worked at several jobs that depended on his ability to see.²

As the second largest grocery chain in the country, Albertsons employs scores of over-the-road drivers to transport its goods and has a strict company policy directed at maintaining safe highway conditions: every one of its drivers must meet or exceed minimum Department of Transportation ("DOT") vision standards. Pet. App. 11a. DOT regulations provide that drivers cannot be certified as medically competent to operate commercial vehicles unless their visual acuity scores are at least 20/40, corrected, in both eyes. 49 C.F.R. § 391.41(b) (10). When Kirkingburg began working as a driver for Albertsons in 1990, he could not fulfill these criteria. Although his right eye has a visual acuity rating of 20/20 with corrective lenses, his left eye visual acuity has always been 20/200. Pet. App. 9a-10a.

Inexplicably, two different medical examiners initially certified Kirkingburg as meeting DOT and Albertsons' vision standards. Pet. App. 9a. In 1991, Kirkingburg underwent another eye examination. This time, the examining physician correctly determined that Kirkingburg's left eye visual acuity was 20/200. This did not meet DOT and company standards; thus, the physician refused to certify Kirkingburg. *Id.* at 10a. Because Kirkingburg could not satisfy the necessary vision requirements, Albertsons determined that he was not qualified to drive the company's commercial vehicles and terminated him from his truck driver position. *Id.* at 11a.

² Before working as a truck driver for petitioner Albertsons, Kirkingburg trained and worked as a jet aircraft mechanic and crew chief to the basic air commander (1957-60), worked as an auto mechanic for Los Angeles County (1968-78 or '79), and beginning in 1979, drove commercial vehicles. Appellee Br. at 21 n.6.

A few months later, Kirkingburg presented the company with a vision waiver from the Federal Highway Administration ("FHA"), which he had obtained under a new program that granted exemptions from DOT regulatory requirements. Pet. App. 11a, 37a-38a. Out of concern for public and driver safety, Albertsons has never accepted these waivers for any of its drivers. It declined to do so for Kirkingburg. Pet. App. 11a, 37a, 41a.

Kirkingburg filed suit in the United States District Court for the District of Oregon, claiming that Albertsons violated the Americans with Disabilities Act, 42 U.S.C. § 12110 *et seq.*, by refusing to accommodate his eye condition. Albertsons moved for summary judgment, arguing that Kirkingburg was not a qualified individual with a disability because he could not perform an essential function of his job—satisfying minimum DOT vision standards. The district court granted summary judgment on that ground. Pet. App. 36a-44a.

In a 2-1 decision, the Ninth Circuit reversed. The majority held that Kirkingburg is disabled under the ADA because he is substantially limited in the major life activity of seeing. The majority viewed Kirkingburg's "monocular" vision, in and of itself, as decisive: it necessarily meant that he sees in a "different" manner from most people. In the alternative, Kirkingburg raised a genuine issue of fact as to whether Albertsons regarded him as disabled. The majority further held that Kirkingburg raised a material fact question as to whether he could perform the essential functions of a commercial truck driver, and that Albertsons' policy of requiring drivers to satisfy DOT vision acuity standards, without regard to whether they have FHA vision waivers, is not a valid job-related requirement. Finally, the majority ruled that Albertsons failed to show that Kirkingburg and other waiver recipients posed a direct threat to safety. Pet. App. 8a-28a.

Judge Rymer dissented on the ground that satisfying the DOT's usual vision acuity regulations was an essential function of Kirkingburg's job and that Albertsons was not obliged to employ as a driver a person who satisfied only the requirements of the FHA's experimental waiver program, not the DOT safety standards themselves. Since the DOT had not determined that the vision waiver program was consistent with highway safety, there was no justifiable reason that employers should be compelled to accept such waivers. Pet. App. 28a-33a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision fundamentally—and erroneously—alters the standards that an individual must satisfy in order to qualify as "disabled" under the Americans with Disabilities Act. The first of the ADA's three alternative definitions of disability is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). By finding that it is sufficient for a plaintiff merely to possess an impairment that renders him or her "different," the court of appeals simply discarded much of this language. Gone is the requirement of a significant restriction in functioning, which is plain from the words "substantially limits." And gone is the emphasis on the "individual." There is no need to inquire into the consequences of a disorder for a particular person if he or she has a known condition. A diagnosis alone is adequate to ascertain that the person is "different."

The Ninth Circuit's decision squarely conflicts not only with the plain language of the ADA, but also with its legislative history and with regulations promulgated under the Act. These demand a functional, fact-based analysis of whether an impairment severely constrains an individual. Because the proper approach to the disability determination involves examining an individual's specific limitations, it

necessarily follows that any mitigating measures (such as the plaintiff's natural adaption here) must be taken into account. Otherwise, the person's actual restrictions are ignored.

The Ninth Circuit's approach unjustifiably expands the scope of the ADA by providing coverage to plaintiffs with non-limiting impairments. This distorts the Act's legitimate anti-discrimination goals. It invites strategic behavior by persons with medical conditions that do not impair functioning. And it creates unwarranted costs for employers and co-workers at whose expense mildly limited individuals must be accommodated. This Court should restore the appropriate, congressionally-intended balance to the ADA by making clear (as other circuits have done) that persons are disabled within the meaning of the Act only if they establish that an impairment in fact substantially limits a major life activity.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THE PLAIN LANGUAGE OF THE ADA AND ITS IMPLEMENTING REGULATIONS

A. By Equating A Difference With A Disability, The Ninth Circuit Disregarded The ADA's Requirement Of An Individualized, Functional Analysis Of Substantial Limitations

The Ninth Circuit concluded that Kirkingburg is disabled within the meaning of the ADA because his "inability to see out of one eye *affects* his peripheral vision and depth perception." Pet. App. 14a (emphasis added). Discounting the adjustments that Kirkingburg's brain has made to compensate for his vision deficiencies, the court explained that "Kirkingburg sees using only one eye; most people see using two." *Id.* at 14a-15a. Based on these conclusory observations, the court held that "there is no question that Kirkingburg is substantially limited in the major life activity

of seeing." *Id.* at 14a. The Ninth Circuit, therefore, focused solely on Kirkingburg's medical impairment and the fact that he sees "differently" from other people. *Ibid.* Because the court stopped at finding an impairment, it read the statutory phrase "substantially limits" out of the text. It neglected to make a reasoned assessment of whether Kirkingburg's monocular vision actually impacts his functioning in a significant way.

The Ninth Circuit's holding that a "difference" is equivalent to a disability should be rejected for a simple reason: the ADA means what it says. In any case of statutory construction, the inquiry begins with the "language of the statute." *Bailey v. United States*, 516 U.S. 137, 144 (1995). Where, as here, "the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, No. 97-1287, slip op. at 5 (U.S. Jan. 25, 1999). By its own terms, the ADA mandates more than just a recognition of a "difference" in, or effect on, the performance of life activities. See *Dutcher v. Ingalls Shipbuilding, Inc.*, 53 F.3d 723, 726 (5th Cir. 1995) ("A physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA"); *Kelly v. Drexel Univ.*, 94 F.3d 102, 108 (3d Cir. 1996) (same). Rather, by defining a disability as a physical or mental impairment that "substantially limits" the individual, the ADA on its face is concerned with severe restrictions in functioning. 42 U.S.C. § 12102(2)(A). See *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 199 (4th Cir. 1997) (the "ordinary or natural meaning of 'substantially limits' requires that an impairment significantly restrict an individual's ability to perform a major life activity"); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) ("not every impairment that affect[s] an individual's major life activities is a substantially limiting impairment"); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870-872 (2d Cir. 1998) ("in assessing whether a

plaintiff has a disability, courts have been careful to distinguish impairments which merely affect major life activities from those that substantially limit those activities"); see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1986) (defining "substantial" as "being of moment: important, essential" and "considerable in amount").

The statute also requires analysis of whether an impairment produces significant disadvantages *for the particular person who is seeking to invoke the protections of the Act*. It is simply not possible to gauge the "limits" that a condition imposes on "the major life activities of [the] individual" without examining the individual. 42 U.S.C. § 12102(2)(A). See, e.g., *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 897 (10th Cir. 1997), cert. granted, No. 97-1943 (Jan. 8, 1999) (the statutory phrase "with respect to the individual" signifies that there must be an individualized, case-by-case evaluation of whether a given impairment amounts to a substantial limitation). Thus, the dividing line between the "disabled" and the impaired is judged by how an impairment manifests itself in constraints on a person's daily life, and the degree to which it does so. That is the core of the "disability" determination.³

Although the interpretive process need go no further, because the statutory language is unambiguous, the legislative

³ The majority of circuits use this fact-based approach, concentrating on whether the plaintiff has significant limitations in his functional abilities. See *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870-872 (2d Cir. 1998); *Kelly v. Drexel Univ.*, 94 F.3d 102, 106-107 (3d Cir. 1996); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995); *Sutton v. United Air Lines*, 130 F.3d 893, 900-901 (10th Cir. 1997); *Swain v. Hillsborough Cty. Sch. Bd.*, 146 F.3d 855, 858 (11th Cir. 1998). But see *Doane v. City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997) (using "difference" test).

history supports the ordinary understanding of the ADA's definition of disability. Committee Reports from both the House and the Senate highlight the importance of confining disability coverage under the ADA's first prong to those who experience profound limitations in life activities. The reports state that "[a] physical or mental impairment does not constitute a disability * * * for purposes of the ADA unless its severity is such that it results in a 'substantial limitation of one or more major life activities.'" H.R. Rep. No. 485, Pt. II, 101st Cong., 2d Sess., at 52 (1990); S.R. Rep. No. 116, 101st Cong., 1st Sess., at 23 (1989). "[M]inor, trivial impairment[s]" are excluded. *Ibid.* Moreover, in order to decide if a person is "substantially limited," the congressional reports direct the courts to engage in a factual inquiry as to the "condition, manner, or duration under which [life activities] can be performed in comparison to most people." *Ibid.* In sum, the existence of an impairment is not enough. "The ADA includes a functional rather than a medical definition of disability." 136 Cong. Rec. 9072 (1990) (statement of Rep. Bartlett, House Manager of the ADA).

Furthermore, Congress was not writing on a blank slate when it drafted the ADA. The Committee Reports indicate that "the definition of the term 'disability' included in the bill is comparable to the definition of the term 'individual with handicaps'" in the Rehabilitation Act of 1973 ("RHA"), 29 U.S.C. § 701 *et seq.* H.R. Rep. No. 485, Pt. II, at 50; S. Rep. No. 116, at 21. And the ADA itself provides that "nothing in this chapter shall be construed to apply a lesser standard than * * * applied" under the RHA. 42 U.S.C. § 12201(a). At the time the ADA was passed, courts had interpreted the RHA's "statutory language, requiring a substantial limitation" as "emphasiz[ing] that the impairment must be a significant one." *Forrisi v. Bowen*, 794 F.2d 931, 933-934 (4th Cir. 1986). Accordingly, Congress intended the phrase to have the same meaning under the ADA. See

Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998) (Congress's repetition of well-established terms from the RHA in § 12102 (2)(A) of the ADA implies that they should be given the same construction as under the RHA).

The ADA and its legislative history, therefore, preclude a finding of "disability" "based on abstract lists or categories of impairments." *Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996); see also *Ryan*, 135 F.3d at 872 ("the determination whether an impairment 'substantially limits' a major life activity is fact specific"). However, that is exactly the method the Ninth Circuit endorsed. The decision below is devoid of any evaluation of the consequences Kirkingburg's monocular vision has upon his life. That Kirkingburg is "almost totally blind in his left eye" (Pet. App. 14a) comprises the beginning and the end of the court's "analysis." Using monocular vision as the touchstone impermissibly recasts the disability determination from an individualized process to a collective approach. If seeing with one eye is tantamount to a disability regardless of the extent to which it impedes the performance of everyday tasks, everyone with that same visual impairment is automatically disabled. On a broader scale, once functionality is eliminated, whether an impairment is a "disability" under the first prong becomes a question of diagnosis instead of actual limitations in life activities. This squarely conflicts with the ADA's focus on each individual's ability level.

The ADA's implementing regulations underscore the vast gulf between the Ninth Circuit's view that an impairment which is a disability for one person is a disability for all and the Act's recognition that "there are varying degrees of impairments as well as varied individuals who suffer from the impairments." *Homeyer*, 91 F.3d at 962. Precisely as Congress envisioned, the EEOC regulations define "substantial limitations" as "[s]ignificant restrict[ions]" in "the

condition, manner or duration" of the plaintiff's activities in relation to the "average person." 29 C.F.R. § 1630.2 (j)(1)(ii). The regulations add that relevant considerations are the nature and severity of the impairment, its duration, and its long-term impact. *Id.* § 1630.2(j)(2). There is no conceivable means by which to undertake any of these assessments without looking beyond a medical diagnosis. Nothing short of a fact-based inquiry into the functional limitations of the particular individual will suffice. See *Bragdon*, 118 S. Ct. at 2202-2206 (conducting a fact-intensive examination of impairment, major life activity, and substantial limitation); *Ryan*, 135 F.3d at 871-872 (using factors listed in § 1630.2 (j)(2) to guide appraisal of plaintiff's specific circumstances); *Katz v. City Metal Co.*, 87 F.3d 26, 31-32 (1st Cir. 1996) (same).

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), the EEOC regulations are entitled to deference. But while the Ninth Circuit referred to the regulations in its opinion, it did little more than that. Pet. App. 14a (citing 29 C.F.R. § 1630.2 (j)(1)(ii) & (j)(2)). The court simply asserted that due to the "the nature of [Kirkingburg's] condition and its permanence," he *must be* disabled. *Ibid.* If the Ninth Circuit had seriously considered the severity and impact of Kirkingburg's monocular vision, it would have ruled in Albertsons' favor. Kirkingburg is not significantly restricted when measured against the "average person"; he did not establish that "he is unable to engage in any usual activity because of his partial blindness." *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) (plaintiff with monocular vision who could "perform normal daily activities" was not disabled); see also *Sutton*, 130 F.3d at 902-903 (plaintiffs with poor vision who could "go about all their normal daily activities" in the "same or similar" manner as the majority of the population were not disabled).

In fact, Kirkingburg's body has learned to offset the deficiencies in his vision to such a degree that he has managed to hold steady jobs in various lines of work and has driven trucks for 20 years. Pet. App. 9a. See *Still*, 120 F.3d at 52 (wide range of jobs plaintiff had held demonstrated that he was not legally disabled); *Roth*, 57 F.3d at 1455 (plaintiff's past work experience, including working as a pharmacist, attorney, and university lecturer repudiated his claim that he was significantly restricted in seeing); *Swain v. Hillsborough Cty. Sch. Bd.*, 146 F.3d 855, 857 (11th Cir. 1998) (plaintiff who worked as a teacher and administrator for 20 years was not substantially limited by her physical impairments). In addition, when the Federal Highway Administration issued Kirkingburg a waiver, it presumed that he was capable of driving commercial vehicles. Therefore, to say that Kirkingburg is substantially limited in the major life activities of seeing or working ignores the evidence and defies common sense.

B. Compensating Mechanisms And Mitigating Measures Must Be Factored Into The Determination Of Whether An Individual Is Disabled

The Ninth Circuit's decision dismisses the internal adjustments Kirkingburg's brain makes for his condition. The ADA and its regulations, while silent on the issue of mitigating measures, do not justify such an approach.⁴ To the contrary, by emphasizing the importance of the individual and the current constraints that he experiences as a result of his impairment, the ADA dictates that natural adaptions must be factored into the disability determination. The ADA

⁴ The Court is presented with the question of whether mitigating measures should be considered in the "substantial limitation" analysis in two pending cases, *Sutton v. United Airlines*, No. 97-1943 and *Murphy v. United Parcel Serv.*, No. 97-1992.

expressly covers only those impairments that actually place "substantial limitations" on life activities, not impairments that *may* do so. 42 U.S.C. § 12102(2)(A). If mitigating measures are discounted, the effect is to pretend that substantial limitations exist when, in fact, they do not.

Other courts of appeals have pointed to plaintiffs' own capacities to adjust to their impairments as grounds for finding that they are not "substantially limited" in their life activities. For example, in *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1449, 1455 (7th Cir. 1995), as in this case, the plaintiff's visual condition was not completely correctable with lenses, but he had "'adapted well to daily activities.'" The Seventh Circuit concluded that plaintiff had failed to demonstrate that he was disabled. Similarly, the Fifth Circuit has ruled that a plaintiff was not "substantially limited" because she had "trained herself" to do "'all of the basic things' she needs to do in life with her [injured] arm." *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995).

Even the EEOC's interpretive guidelines, which in critical respects misinterpret the statute, support this position. The guidelines say that disability should be assessed by excluding *external* compensations: "whether an individual is substantially limited in a major life activity must be made *** without regard to mitigating measures, such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt. 1630.2(j) app. This suggests that *internal* adaptions like Kirkingburg's *should* be considered in making the disability determination.

The line apparently drawn in the EEOC's guidelines between *internal* and *external* mitigating measures is not, however, a tenable one given the ADA's language and congressional intent that only actual, significant limitations

should lead to a finding of disability.⁵ Properly understood, we believe the ADA requires that both *internal and external* mitigating factors must be taken into account in determining disability. External mitigating measures are just as important as internal mitigating measures in assessing an individual's true capabilities. While the EEOC guidelines appropriately deal with *internal* adaptions, the same cannot be said for their exclusion of *external* remedies. See *Sutton*, 130 F.3d at 902 (refusing to follow EEOC interpretive guidance on mitigating measures due to its conflict with the text of the ADA); *Gilday v. Mecosta County*, 124 F.3d 760, 767, 768 (6th Cir. 1997) (same) (Kennedy, J. and Guy, J., concurring in part and dissenting in part).

Internal and external compensating measures similarly affect the extent to which a limitation interferes with life activities. Kirkingburg does not experience "substantial limitations" because adjustments in his brain alleviate the effects of his poor eyesight. Another person may not have a disabling impairment because he can improve his vision with corrective lenses. Likewise, one person may manage his high blood pressure with medication, whereas another may lower it through relaxation techniques, so that neither is restricted in carrying out everyday tasks. In each instance, the end result is identical—the person is not substantially limited in major life activities. Consequently, it is nonsensical to afford the protection of the ADA to one class of plaintiffs but not to the other.

Any contention that legislative history justifies ignoring external mitigating measures is flawed. The Senate Report

⁵ Interpretive guidelines are not entitled to the same deference as regulations. See *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87 (1995); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991).

states that under the ADA's first prong "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, *such as reasonable accommodations or auxiliary aids.*" S. Rep. No. 116, at 23 (emphasis added). "Reasonable accommodations" and "auxiliary aids" are specifically defined in the statute as job-assistive devices supplied by employers. 42 U.S.C. § 12111(9) (reasonable accommodations include "the provision of qualified readers or interpreters," the "acquisition and modification of equipment or devices," and other "similar" accommodations); 42 U.S.C. § 12102(1) (listing the same measures as auxiliary aids). They do not include employee-supplied mitigating measures. Accordingly, the Senate Report stresses that "personal use items such as hearing aids or eyeglasses" do *not* fall within the definition of reasonable accommodations. S. Rep. No. 116, at 33.

The logical reading of the Senate Report is therefore that a person must first be adjudged as disabled using the "substantially limited" test, which takes account of mitigating measures. Only then, if the person is disabled, do potential reasonable accommodations or auxiliary aids become an issue. See, e.g., 42 U.S.C. § 12112(b)(5)(A) (it is a violation of the Act to neglect to make reasonable accommodations for a qualified individual with a disability); 42 U.S.C. § 12182 (b)(2)(A)(iii) (it is a violation of the Act for a place of public accommodation to fail to furnish auxiliary aids to a disabled person).⁶

⁶ The House Report contains the same language as the Senate Report, but adds that a person should be considered "substantially limited" "even if the effects of the impairment are controlled" by medication or medical devices. H.R. Rep. No. 485, Pt. II, at 52. The House Report is in this regard both internally inconsistent and at odds with the Senate Report (not to mention the plain language of the statute). We believe that the Senate Report serves as the better guide.

That the Senate did not intend its reference to "mitigating measures" to encompass personal medications and aids as opposed to on-the-job accommodations is bolstered by its description of the purpose of the "regarded as" prong of the disability definition:

Another important goal of the [regarded as] prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

S. Rep. No. 116, at 24.⁷ This passage clearly indicates that

⁷ Of course, an individual who takes medication, wears glasses, or internally compensates for a medical condition is not automatically disabled under the "regarded as" prong. There must be a separate inquiry into whether the employer perceived the individual as having a substantially limiting impairment and discriminated against the individual for that reason. See, e.g., *Kelly*, 94 F.3d at 109; *Ryan*, 135 F.3d at 872. The Ninth Circuit's alternative holding that Kirkingburg had raised a fact question about whether Albertsons perceived him as having a disability ignores these requirements: "substantial limitation" was neither part of the court's inquiry nor part of Kirkingburg's argument. The Ninth Circuit's observation that one manager described Kirkingburg as "blind in one eye or legally blind" shows only that Albertsons perceived him as impaired, not that it perceived him as substantially limited. Pet. App. 16a-17a. Three members of this Court have declared that this does not satisfy the "regarded as" prong. See *Bragdon*, 118 S. Ct. at 2214 n.1 (Rehnquist, C.J., Scalia and Thomas, JJ., concurring in the judgment in part and dissenting in part) ("Respondent has offered no evidence to support the assertion that petitioner regarded her as having an impairment that substantially limited her ability to reproduce, as opposed to viewing her as simply impaired").

individuals who can adequately compensate for their impairments are not disabled under the ADA's first prong, 42 U.S.C. § 12102(2)(A), and can only qualify as disabled under the "regarded as" prong. And it can only mean that the assessment of disability under subsection (A) requires looking at the individual's level of functioning with the benefit of ameliorative or corrective measures. Thus, the ADA's legislative history strongly supports taking mitigating measures into account, just as the statutory text requires.

II. THE NINTH CIRCUIT'S "DIFFERENCE" TEST EXPANDS THE ADA BEYOND ITS INTENDED SCOPE AND DISRUPTS THE FAIR DISPENSATION OF ITS BENEFITS

Most circuits employ a functional, fact-based evaluation of whether a plaintiff has significant restrictions. This allows for the fair and even-handed treatment of all potential plaintiffs because eligibility for coverage under the Act turns on each person's specific situation. In contrast, the Ninth Circuit's "difference" test substitutes a medical diagnosis for an individualized examination of a particular plaintiff, thereby overlooking the inevitable variations in ability that occur between people with the same, or similar, impairments. The practical danger with using the Ninth Circuit's approach is that it permits those who have non-limiting or minor impairments to benefit from the ADA's remedial provisions, despite Congress's express directive to the contrary. See S. Rep. No. 116, at 23; H.R. Rep. No. 485, at 52.

This problem is most likely to manifest itself in the numerous cases involving non-traditional impairments. Plaintiffs with conditions such as joint disorders, depression and anxiety, and non-blinding vision problems—conditions that do not always produce obvious limitations—would all be subsumed within the umbrella of the ADA. Although these

conditions can have disparate outcomes and may disable some people but not others, a court would never reach the point of making such distinctions. The mere diagnosis of the impairment would be enough, even if the plaintiff had completely adapted to the condition or experienced only a minor reduction in functioning.

Holihan v. Lucky Stores, Inc., 87 F.3d 362, 364-366 (9th Cir. 1996), provides an example of how the failure to apply the "substantially limits" standard creates a new class of ADA beneficiaries who do not warrant, or require, protection. In *Holihan*, the plaintiff suffered from depression and anxiety. He was terminated as the store manager at a supermarket after he exceeded the six months of medical leave authorized by company policy. When the supermarket refused to rehire him as anything but a clerk, he filed a discrimination suit. The court held that Holihan's mental condition "did not substantially limit any of his major life activities." It was persuaded by the fact that while on leave, Holihan had pursued other business ventures, including selling real estate and setting up a sign-making shop. Under the Ninth Circuit's revised articulation of the disability determination, Holihan would be deemed "disabled" simply because a physician labelled him as having an "organic mental syndrome." The absence of constraints on his daily life, which should readily disqualify him from ADA protection, would be of no moment.

The ADA cannot properly be interpreted in a way that renders the words "substantially limits" superfluous. An observation frequently made by the courts aptly summarizes the consequences of doing so and of indulging the strategic claims of plaintiffs with minor impairments:

[T]he ADA assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the

insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.

Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997); see also *Patrick v. Southern Co. Servs.*, 910 F. Supp. 566, 567 (N.D. Ala.) ("Much of the criticism of the ADA in practice has come from the truly disabled who recognize that * * * attempted stretches [of the definition of disability] can cause negative reaction to the Act and perhaps undermine its true purposes"), aff'd, 103 F.3d 149 (11th Cir. 1996).

The Ninth Circuit's expansion of the definition of disability threatens to disrupt the ADA beyond just the threshold disability determination. One of the employers' obligations under the ADA is to provide "reasonable accommodations" to its disabled employees. 42 U.S.C. § 12112(b)(5)(A). Enabling the many individuals who are "different" rather than "disabled" to demand accommodations would potentially impose enormous costs on employers without improving the lot of the truly disabled.

Accommodations to these essentially unimpaired individuals would be a matter of convenience, not legitimate need, and would thus result in unfairness to other employees. For instance, in the trucking industry an often-requested accommodation is a change in route. See, e.g., *Champagne v. Servistar Corp.*, 138 F.3d 7, 10 (1st Cir. 1998) (request to remain on "regular route" due to psychological problems); *Penny v. United Parcel Serv.*, 128 F.3d 408, 410 (6th Cir. 1997) (request to be assigned "lightest route possible" due to back and shoulder problems). Ordinarily, assignments to preferred positions are based on merit or seniority (or are reserved for the truly disabled). But if a driver whose limitations are not genuinely significant has the force of law

behind him, he may be able to demand and get a better or reduced route. Hence, while in this and other circumstances, employers may have to make minimal expenditures, the cost to other employees is always high.

The Ninth Circuit's overreaching may also come at the expense of safety. Many individuals are not sufficiently restricted to be disabled, but nevertheless present genuine safety risks to themselves and others. Employers must be entitled to refuse to hire such employees, particularly in industries where safeguarding the public is a serious concern. See *Joyce v. Suffolk County*, 911 F. Supp. 92, 96-97 (E.D.N.Y. 1996) (officer with 20/200 vision that was correctable to 20/20 was not substantially limited and police force could reject him because officers cannot "call a 'time out' in emergencies while they look for their glasses or lost contact lenses"); see also *Knapp v. Northwestern Univ.*, 101 F.3d 473, 479-482 (7th Cir. 1996) (student with internal defibrillator was not disabled, and university could prohibit him from playing intercollegiate basketball due to risk that he would suffer cardiac death). Otherwise, in complying with the ADA, employers not only jeopardize the public but also open themselves up to huge liabilities for negligence.

As one court expressed it, "'Woe unto the employer who put such an employee behind the wheel of a vehicle * * * which was involved in a vehicular accident.'" *Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (citations omitted). And as the district court in this case observed, if Kirkingburg "were ever involved in an accident, defendant would have difficulty explaining why it hired a driver who could not meet DOT vision requirements." Pet. App. 41a.

Employers should not have to choose between violating the ADA or being sued for negligence.⁸

The Ninth Circuit's "difference" test creates a perverse incentive to misrepresent non-limiting impairments when convenient to secure employment. A good example of this is *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995), in which a would-be pediatrician claimed that he had been discriminated against during the selection process for a residency program due to his poor vision. Dr. Roth was born with eye impairments that altered his ability to fuse images and to sense depth. *Id.* at 1449. He alleged that these problems prevented him from pursuing his chosen profession because he could not work for more than eight to ten hours at a time and all residency programs require long shifts. *Id.* at 1454. On school and job applications, however, Dr. Roth either failed to list his visual condition when specifically asked about "handicaps" or characterized himself as "cured." *Id.* at 1448. He completed pharmacy and law degrees—earning the latter full time while working as a pharmacist—and served as a faculty lecturer and defense attorney/consultant while attending medical school, all without accommodation. *Id.* at 1455-1456. The Seventh Circuit denied Dr. Roth's request for a preliminary injunction ordering his admission to the residency program, holding that he was not substantially limited in seeing or learning. Dr. Roth's impairment may have "affected" his major life activities, but it did not "ris[e] to the level of a disability." *Id.* at 1454.

⁸ The defense that the employee is not "qualified" and poses "a direct threat to the health or safety of other individuals" may not always shield employers in this situation. 42 U.S.C. §§ 12112(a), 12113(b). Plaintiffs who are covered under the ADA because they are "different" do not have significant functional restrictions; therefore, a court might find them "qualified" and dismiss safety standards that exclude them as being unnecessarily strict.

The application of the Ninth Circuit's "difference" test to these facts would produce an absurd and unjust result. Dr. Roth's diagnosed eye conditions and the evidence that they had some effect on his sight would render him disabled. Ignored would be the contrary evidence that he could perform lengthy, uninterrupted, eye-straining work, and the fact that he had informed employers and educators that he suffered no limitations. In short, Dr. Roth would be permitted to use his impairment "when it was beneficial and opportune"—to get him the job of his choice. 57 F.3d at 1456. But as the Seventh Circuit observed, "there is a clear bright line of demarcation between extending the statutory protection to a truly disabled individual (so that he or she can lead a normal life * * *) and allowing an individual with marginal impairment to use disability laws as bargaining chips to gain a competitive advantage." *Id.* at 1460.

The benefits an individual can receive under the ADA certainly carry the potential to encourage opportunistic behavior. The Ninth Circuit's "difference" test would reward that behavior, transforming the ADA into an instrument through which individuals with minor impairments can obtain the jobs of their choice, structured as they choose, in the process generating unacceptable costs for employers, employees, and the public. *Amici* urge this Court to make clear that only real disabilities that substantially impinge on a person's ability to carry out normal life functions when internal compensations or external mitigating measures are taken into account, are within the protection of the ADA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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